

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE WESTERN DISTRICT OF TEXAS

3 WACO DIVISION

4 AMERICAN PATENTS, LLC

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5 VS.

\* CIVIL ACTION NO. W-18-CV-339

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6 MEDIATEK, INC, ET AL

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May 30, 2019

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8 BEFORE THE HONORABLE ALAN D ALBRIGHT, JUDGE PRESIDING  
MOTION HEARING

9 APPEARANCES:

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25

1 Court Reporter: Kristie M. Davis  
2 United States District Court  
3 PO Box 20994  
4 Waco, Texas 76702-0994

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6 produced by computer-aided transcription.  
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1 (May 30, 2019, 10:31 a.m.)

2 DEPUTY CLERK: Pending motion hearing in Civil Action  
3 W-18-CV-339, styled American Patents, LLC vs. Mediatek,  
4 Incorporated, et al.

5 THE COURT: Good morning. If counsel would do two things.  
6 If you would introduce everyone who is in attendance, and if  
7 you also would be kind enough as to tell me who the folks are  
8 that will primarily be speaking as well.

9 MR. DAVIS: Good morning, Your Honor. Stafford Davis on  
10 behalf of plaintiff American Patents, LLC. With me are Zack  
11 Harrington and Larry Thompson, and they will both be speaking  
12 on behalf of plaintiff.

13 THE COURT: Very good.

14 MR. FINDLAY: Good morning, Your Honor. Eric Findlay,  
15 along with Martin Bader and Lai Yip on behalf of Lenovo  
16 defendants, and Mr. Bader will be handling customer suit sever  
17 and stay motion, and Ms. Yip will be handling the  
18 jurisdictional issues.

19 THE COURT: Very good.

20 MR. FINDLAY: Thank you.

21 THE COURT: And since these are the defendants' motions,  
22 I'll hear from the defendant first.

23 And you're welcome to come up.

24 Just so everyone knows, I have read -- you're welcome to  
25 repeat anything or say anything you think is important, but I

1 have both read everything that you submitted and I have some  
2 understanding of generally what it is you're -- obviously what  
3 you're talking about without needing to go too much into the  
4 background.

5 MS. YIP: Thank you, Your Honor. I took the liberty of  
6 preparing some demonstratives for your reference. May I  
7 approach?

8 THE COURT: Absolutely.

9 MS. YIP: Good morning, Your Honor.

10 The Court issues in this case really boil down to this:  
11 Plaintiff sued the wrong entities. They sued two foreign  
12 companies which do not place the accused products into the  
13 stream of commerce either in Texas or anywhere else in the  
14 U.S., and, meanwhile, the company that does place the accused  
15 products into the stream of commerce, Lenovo U.S., is not a  
16 foreign entity, is located in North Carolina and is unnamed.

17 THE COURT: So is it your position that if they were to  
18 substitute in Lenovo U.S., Lenovo U.S. would not have the  
19 ability to argue that they didn't -- forgetting whether it  
20 should be here in Waco or not. I'm not talking about that, but  
21 you're saying -- and obviously you're not saying Lenovo U.S. is  
22 infringing. I'm just saying -- but your position is that the  
23 two Lenovo entities that were sued by the plaintiff should be  
24 dismissed, they're not the correct entities, and the Lenovo  
25 U.S. is the correct entity?

1 MS. YIP: Correct. Yes.

2 THE COURT: Very good.

3 MS. YIP: That is our position. And, yes. We reserve the  
4 right to challenge venue, but the Lenovo U.S. entity would be  
5 the correct entity here in this case.

6 THE COURT: Okay.

7 MS. YIP: So Lenovo U.S. operates independently, and it is  
8 neither directed nor controlled by the foreign Lenovo entities  
9 with respect to the accused products. Lenovo U.S.'s chief  
10 financial officer, Kurt Cranor, provided extensive testimony on  
11 all of this. Plaintiff demanded the deposition of Mr. Cranor  
12 multiple times and received it, and after a full day of  
13 questioning Mr. Cranor, plaintiff is still unable to present  
14 evidence that would establish jurisdiction under any theory,  
15 whether it's a stream of commerce theory or an agency theory,  
16 and under any burden, whether it's a prima facie burden or a  
17 preponderance burden.

18 THE COURT: Can I ask you a completely irrelevant  
19 question? We have two interns here. And I was thinking  
20 yesterday when they were watching lawyers that they would do  
21 much better by getting to sit up here or over there and watch  
22 you all do your arguments than sitting back there because  
23 you're obviously very competent counsel, and I'm looking  
24 forward to hearing from the plaintiff as well. Would you mind  
25 if they sat up here and watched from this vantage point?

1 MS. YIP: That would be absolutely fine.

2 THE COURT: Why don't you guys come up here? This is a  
3 much better place to listen to good lawyers from.

4 MR. FINDLAY: Your Honor, might we -- they might enjoy a  
5 copy of the slides.

6 THE COURT: There you go. Please.

7 I'm sorry to interrupt you with that.

8 MS. YIP: Oh, no problem at all. Thank you, Your Honor.  
9 So turning first to the burden issue.

10 THE COURT: Okay.

11 MS. YIP: So we really believe that this dispute over  
12 which burden applies is immaterial here because under any  
13 burden, the plaintiff fails. The correct burden is the  
14 preponderance burden because there is no material dispute of  
15 fact, which we will show as we walk through the evidence.

16 Turning to the prima facie burden. Under a prima facie  
17 burden, uncontroverted allegations are accepted as true, but  
18 here the Lenovo defendants have controverted every allegation.

19 So, now, with respect to factual disputes, although  
20 factual disputes are resolved in the light most favorable to  
21 the plaintiff, here, because plaintiff's evidence is so weak,  
22 immaterial, irrelevant or nonexistent even in the light most  
23 favorable to plaintiff, the Lenovo defendants should prevail.

24 Turning now to the stream of commerce issue. The seminal  
25 case here is the Asahi decision from 1987 issued by the U.S.

1 Supreme Court. I went back and I reviewed every Federal  
2 Circuit decision that applied the Asahi test since that  
3 decision was issued in 1987. The first was issued in 1994, the  
4 Beverly Hills Fan case, and the last was 2016, the Polar  
5 Electro case. There were 11 decisions in all.

6 In six of those cases the Federal Circuit found no  
7 jurisdiction over the foreign defendants. In four of those  
8 cases the Federal Circuit found jurisdiction but in  
9 circumstances that are inapplicable here. And if you look at  
10 those decisions, what you see is a pattern emerge.

11 The foreign defendants in those cases all did activities  
12 like manufacture, distribution, sales, shipping. The Lenovo  
13 defendants don't do any of that here.

14 THE COURT: And the name of the -- I'm just trying to make  
15 sure our record stays here. We're going to exclude Lenovo U.S.  
16 The Lenovo defendants we're talking about here are just the  
17 ones that are named in this case?

18 MS. YIP: Yes. That's correct.

19 THE COURT: I get that. I just want to make sure the  
20 record is clear since we have more than just those Lenovo  
21 entities. I want to make sure that that's what we're talking  
22 about, but I get it.

23 MS. YIP: Yes. Thank you.

24 So in the slides we list out all 11 cases for Your Honor's  
25 reference. I won't go through all of them here. Cases 1

1 through 6 are the ones in which the Federal Circuit found no  
2 jurisdiction. Cases 7 through 10 are the ones in which the  
3 Federal Circuit did find jurisdiction in circumstances that  
4 don't apply here, and in the eleventh decision, the  
5 Commissariat case in 2005, the Court found that it needed more  
6 jurisdictional facts in order to make a determination and that  
7 the lower court should have granted jurisdictional discovery  
8 and remanded on that basis, but here obviously --

9 THE COURT: Which case was that?

10 MS. YIP: The Commissariat case in 2005, which is Case No.  
11 11 in the slides.

12 THE COURT: Okay.

13 MS. YIP: On Page 20.

14 THE COURT: Yes, ma'am.

15 MS. YIP: And so in that case the Court -- the Federal  
16 Circuit remanded for jurisdictional discovery, but here  
17 jurisdictional discovery has already taken place.

18 Turning now to the application of the stream of commerce  
19 test. When you look at the evidence that the Lenovo  
20 defendants -- the foreign Lenovo defendants have put forth, it  
21 becomes abundantly clear that the Lenovo defendants do not do  
22 any of the things that the Federal Circuit has found are  
23 necessary in order to find jurisdiction under a stream of  
24 commerce theory.

25 Turning to Slide 22, Mr. Cranor was asked by plaintiff's



1 counsel directly whether or not the Lenovo defendants  
2 manufacture the accused products. And Mr. Cranor testified  
3 under oath that they do not.

4 If you look at plaintiff's rebuttal evidence starting on  
5 Page 23, what you see is that here, and actually throughout  
6 their opposition briefing, they rely heavily on the foreign  
7 Lenovo defendants' annual report. And not only that, the  
8 statements that they rely on are very generic.

9 It's worth mentioning as a threshold matter that it is  
10 well established that in the jurisdictional context statements  
11 in annual reports, SEC filings and the like are extremely weak  
12 evidence of jurisdiction. And that has been affirmed over and  
13 over again at many district courts and in the regional circuits  
14 as well.

15 Turning to Slide 24, the next piece of rebuttal evidence  
16 by plaintiff, plaintiff points to evidence from Mr. Cranor  
17 stating that there is a [REDACTED]

18 [REDACTED]. This doesn't show which [REDACTED]

19 [REDACTED].

20 Plaintiff also points to some testimony that [REDACTED]

21 [REDACTED], but there are at

22 least nine Hong Kong entities that are part of the Lenovo group  
23 of companies.

24 Turning now to shipment. Mr. Cranor testified at  
25 deposition in response to plaintiff's counsel's questioning

1 that the Lenovo defendants do not ship accused products to the  
2 U.S. He was unequivocal in this regard. In response --

3 THE COURT: Wait. Just give me one second. I just want  
4 to -- okay. I just wanted to read it. Thank you.

5 MS. YIP: Sure.

6 In response, plaintiff's rebuttal evidence is third party  
7 data from a company called Import Genius that purportedly  
8 identifies Lenovo Shanghai but does not identify accused  
9 products. This data was attached to the plaintiff's opposition  
10 briefing. It's about seven, eight, nine pages, and if you look  
11 through every page, there are no accused products identified.

12 The plaintiff does not present any shipment evidence with  
13 respect to LGL, Lenovo Group Limited, the other foreign  
14 defendant, the other foreign Lenovo defendant.

15 Turning next to shipment. Slide 27, the Lenovo defendants  
16 do not import the accused products into the U.S. Mr. Cranor  
17 provided copious testimony on this point. In his declaration  
18 he declared under oath that the Lenovo defendants do not import  
19 or ship the accused products into the United States, and he was  
20 questioned about this again at deposition and he said, again,  
21 from an importation perspective, Lenovo United States -- Lenovo  
22 United States imports the product. We're listed as the  
23 importer of record. The plaintiff has provided no rebuttal  
24 evidence in this regard.

25 THE COURT: I don't know what that means, we're listed as

1 the importer of record. I don't know what that means.

2 MS. YIP: So, all importation has an importer. All  
3 importation activities require an importer of record. And so  
4 in this case Lenovo U.S. is the importer of record. There may  
5 be a --

6 THE COURT: I'm sorry. I didn't mean to interrupt you.

7 Let me ask you this: So I'm just making sure I follow  
8 what Mr. Cranor said. When he says, so whether -- and this is  
9 on Slide 27. So whether it came from -- regardless, I'll say  
10 of where -- where it was shipped from, we're -- we're is  
11 referring to Lenovo U.S.?

12 MS. YIP: Correct. Yes. Lenovo U.S. Thank you for the  
13 question.

14 THE COURT: Okay.

15 MS. YIP: And, again, the plaintiff has presented no  
16 rebuttal evidence that we have identified in response to this.

17 THE COURT: Okay.

18 MS. YIP: And ultimately from a big picture perspective,  
19 Lenovo U.S. is the entity that does everything in the United  
20 States with respect to the products. Lenovo U.S. is an  
21 independently operating entity that controls sourcing,  
22 distribution, marketing, everything relating to presenting the  
23 accused products to the market, to the United States market.

24 Turning now to the agency theory, which is the only other  
25 theory that plaintiff has presented to the Court to assert

1 jurisdiction. Turning to the standard is an important way to  
2 start because it's important to remember that the standard for  
3 finding agency in a jurisdiction context is extremely high. It  
4 is very difficult to show agency in order to find jurisdiction  
5 over a foreign defendant.

6 The Eastern District of Texas issued a decision in 2016  
7 that is instructive here. This is the Fellowship Filtering  
8 case which we cited in our briefing. And in that case the  
9 Court said: For an agency relationship to permit imputation of  
10 contacts, the parent company's control over the agent must  
11 pervade the agent's dealing with the forum. As a result, the  
12 typical corporate relationship between a parent and subsidiary,  
13 including 100 percent stock ownership and identity of directors  
14 and officers, is not a sufficient basis to impute the contacts  
15 of a third party to the defendant under an alter ego theory.

16 So here, even though the Court refers to alter ego, the  
17 analysis in the whole decision is about agency.

18 Turning to Slide 32, the Court also said, even under a  
19 theory of imputed contacts, the defendant must deliberately  
20 engage in significant activities within a state in order for  
21 exercise of personal jurisdiction to comport with due process.  
22 And you see here that in both instances the Court is citing and  
23 relying on regional circuit authority, including Federal  
24 Circuit authority which is the Nuance case.

25 So if you look at the Fellowship case and the facts there,

1 you'll see a lot of parallels here in our case. In that case  
2 the parent company was Alibaba Group and the other entity was a  
3 U.S. entity Alibaba.com, Inc.

4 And there the Court found the context of the parent  
5 company should not be imputed to subsidiary and that the  
6 evidence plaintiff relies on to support agency demonstrates  
7 nothing more than a typical parent/subsidiary corporate  
8 relationship.

9 So just some of the evidence that the Court found to be  
10 insufficient to find personal jurisdiction: A tax agreement  
11 signed by the director of the parent on behalf of the  
12 subsidiary; complete identity of officers and directors, even  
13 coupled with other indicia of alter ego status is not a  
14 sufficient basis to impute context of a third party to the  
15 defendant; deposition testimony indicating that other entities  
16 review certain decisions made by the subsidiary and SEC filings  
17 indicating that various Alibaba entities have contractual  
18 relationships enabling effective control over one another found  
19 to be insufficient.

20 And the Court said, the fact that a parent company may  
21 exercise some degree of control over its subsidiaries does not  
22 demonstrate that the corporate forum should be disregarded for  
23 purposes of personal jurisdiction. Indeed, review of certain  
24 budget requests or potential business partnerships pursuant to  
25 a contractual agreement does not demonstrate parental control

1 that pervades the agent's dealings with Texas.

2 Statements made in SEC filings, also insufficient  
3 evidence. 100 percent ownership of a subsidiary, insufficient  
4 evidence. Broad sweeping statements in various SEC filings  
5 regarding close integration, insufficient evidence. So all of  
6 those facts echo the facts in our case or at least the facts  
7 that plaintiff purports to rely on in asserting jurisdiction.

8 So plaintiff claims that Lenovo U.S. is the agent of  
9 Lenovo Group Limited, LGL, which I'll abbreviate as LGL here.  
10 The plaintiff makes no such argument as to Lenovo Shanghai.  
11 Plaintiff has not asserted that Lenovo U.S. is the agent of  
12 Lenovo Shanghai; however, plaintiff presents no evidence  
13 showing that LGL's control over Lenovo U.S. pervades its  
14 dealings with the forum either in Texas or any other forum.

15 Turning to Slide 37, plaintiff's counsel had ample  
16 opportunity, a full day, to depose Mr. Cranor, and Mr. Cranor  
17 testified over and over again that [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 He testified: [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED].

1 And it's important here to remember that Mr. Cranor is not  
2 just any Lenovo U.S. employee. He is the chief financial  
3 officer. He has been at the company for 14 years, 14 years in  
4 senior management or executive roles. His knowledge of the  
5 company and what it does in the United States is virtually  
6 unparalleled at Lenovo U.S.

7 Turning now to the next piece of evidence for Lenovo  
8 defendants' evidence. On Slide 38, again, at this full day  
9 deposition, Mr. Cranor testified that [REDACTED]

10 [REDACTED]  
11 [REDACTED]. He testified: [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]. And, in fact, it is  
16 not.

17 Next, plaintiff's counsel asked numerous questions  
18 regarding contractual [REDACTED]

19 [REDACTED]  
20 [REDACTED].

21 Plaintiff's counsel asked: [REDACTED]  
22 [REDACTED]?

23 Answer: [REDACTED].

24 [REDACTED]?

25 Answer: [REDACTED].

1 Question: [REDACTED]

2 [REDACTED]?

3 Answer: [REDACTED].

4 Mr. Cranor repeatedly and consistently conveyed the  
5 independence and autonomy of its company.

6 Plaintiff's counsel asked: [REDACTED]

7 [REDACTED]?

8 His response: [REDACTED].

9 Question: [REDACTED]

10 [REDACTED]?

11 His answer: [REDACTED].

12 Mr. Cranor also at this full day deposition testified that

13 [REDACTED]. He testified: [REDACTED]

14 [REDACTED]

15 [REDACTED].

16 And plaintiff's counsel asked: [REDACTED]

17 [REDACTED]?

18 And Lenovo U.S.'s chief financial officer testified: [REDACTED]

19 [REDACTED].

20 Mr. Cranor also testified that [REDACTED]

21 [REDACTED]

22 [REDACTED].

23 He was asked: [REDACTED]

24 [REDACTED]

25 [REDACTED]? And he said [REDACTED].



1 He was also asked: [REDACTED]

2 [REDACTED]?

3 And he said [REDACTED].

4 So what we see here, again, is repeated consistent  
5 testimony that [REDACTED].

6 Now, turning to plaintiff's rebuttal testimony, what we  
7 see here is testimony -- is rebuttal evidence. Excuse me.  
8 What we see here is evidence that is extremely weak, immaterial  
9 and irrelevant. It certainly does not show pervasive control  
10 by LGL over Lenovo U.S. as is required to show jurisdiction  
11 under an agency theory. Plaintiff's evidence is that Lenovo  
12 U.S. is a wholly owned subsidiary of LGL.

13 This was addressed in the Fellowship case, and there the  
14 Court said, even 100 percent ownership of a subsidiary is not a  
15 sufficient basis to disregard the corporate forum. Plaintiff's  
16 evidence, statements in the annual report purportedly showing  
17 the group has control over subsidiaries. And it's important  
18 here to point out that especially in the briefing there has  
19 been a lot of -- in the evidence that has been attached to the  
20 briefing and in the briefing itself, there's been a lot of  
21 reference to Lenovo Group and/or we or our with no context as  
22 to which entities these actually refer to, and in fact, if you  
23 look at the way Group is defined in the annual report that  
24 plaintiff relies on so heavily, Group is not defined as Lenovo  
25 Group Limited. It's actually defined as the whole group of

1 companies.

2 In any event, these statements are immaterial as a matter  
3 of law because the Fellowship case said, broad sweeping  
4 statements made in various SEC filings indicating that in that  
5 case the Alibaba entities are closely integrated do not counsel  
6 in favor of disregarding the corporate forum.

7 Next, plaintiff's rebuttal evidence is that Lenovo U.S.  
8 employees, specifically Mr. Zielinski, Mr. Skaugen and  
9 Ms. Quatela, purportedly report up to officers of LGL, but this  
10 is just completely immaterial and irrelevant because Mr. Cranor  
11 already testified that [REDACTED]

12 [REDACTED].

13 He also testified that [REDACTED]  
14 [REDACTED]  
15 [REDACTED] in response to  
16 plaintiff's counsel's question at the deposition.

17 In the Fellowship case and a case that plaintiff's counsel  
18 relies on, the PPA case out of the Western District of  
19 Washington, both make clear that the facts here or the facts  
20 that the plaintiff purports to rely on regarding reporting up  
21 to officers of the parent are insufficient to show agency for  
22 jurisdiction.

23 Next, plaintiff relies on a third party article published  
24 by PricewaterhouseCoopers calling Lenovo U.S. a headquarters.  
25 It's frankly difficult to understand how this is relevant at

1 all to the agency theory. Being called a headquarters by a  
2 third party does not show LGL's control over Lenovo U.S. and  
3 certainly does not show pervasive control.

4 Next, plaintiff relies on Lenovo U.S.'s sales being  
5 reported in the consolidated annual report. The PPA case,  
6 again, one that plaintiff itself relied on said: Consolidation  
7 of subsidiary's activities into parent company's reports is  
8 insufficient to support agency -- support an agency  
9 relationship. We also cited a case, the Hildebrandt case in  
10 our opening brief that defines the same thing.

11 Plaintiff also relies on some testimony regarding [REDACTED]  
12 [REDACTED]  
13 [REDACTED], and plaintiff claims that this shows  
14 agency because [REDACTED].  
15 This evidence is extremely weak and irrelevant and, frankly,  
16 illogical. It is really quite common for companies to make all  
17 kinds of decisions [REDACTED]  
18 [REDACTED]. It certainly does not show that [REDACTED]  
19 [REDACTED]. And, in fact, the evidence  
20 establishes that Lenovo U.S. is a very, very large operating  
21 company with many thousands of employees.

22 Next, plaintiff relies on evidence that -- more of an  
23 argument than evidence, that LGL, Lenovo U.S. and Lenovo  
24 Shanghai are purportedly indistinguishable to consumers and,  
25 therefore, consumers must be confused.

1 First, it's irrelevant as a matter of law because  
2 consumers are simply buying an end product and have no reason  
3 to distinguish between various corporate entities, and it  
4 doesn't show pervasive control in any event. And it's worth  
5 noting that the British Telecomm's case which plaintiff  
6 relies on -- actually plaintiff relies on this case really  
7 extensively in its supplemental brief. And the British  
8 Telecomm's case, which is a case out of Delaware, it's not a  
9 jurisdiction case. It's a case about vicarious liability under  
10 an agency theory. And in any event, the plaintiff cites  
11 British Telecomms for the proposition that consumer confusion  
12 suggests an agency -- suggests an agency relationship, and, in  
13 fact, the case doesn't say anything about that.

14 Plaintiff also relies on testimony from Mr. Cranor. So at  
15 the deposition plaintiff [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]. Plaintiff  
19 uses this testimony to argue that consumers must be confused  
20 about the various Lenovo entities and are unable to distinguish  
21 between them.

22 First of all, as I previously mentioned, plaintiff has  
23 cited no case law that would suggest that consumer confusion  
24 suggests agency. Consumer confusion is a concept that is very  
25 important in trademark law, but there is no authority here that

1 plaintiff has cited that would suggest that it's a material  
2 consideration in the agency context. And in any event,  
3 Mr. Cranor saying [REDACTED]  
4 [REDACTED] does not show that any consumer is confused and in  
5 fact doesn't even show that Mr. Cranor is confused. And, most  
6 importantly, it doesn't show pervasive control by LGL over  
7 Lenovo U.S., which is the standard.

8 Next, plaintiff relies on the annual report again and its  
9 references to we, our and us. Plaintiff's argument is that  
10 because the Lenovo entities refer to themselves collectively  
11 that they must be agents of each other. That appears to be the  
12 argument that they are making, but, again, in the Fellowship  
13 case the Court found that there is no jurisdiction on the basis  
14 that Alibaba Group holds out its U.S. subsidiary as being part  
15 of a tightly integrated Alibaba group.

16 So that is really the sum total of plaintiff's rebuttal  
17 evidence. And what we see here is that even under a prima  
18 facie burden of proof, even in the light most favorable to  
19 plaintiff, plaintiff is unable to establish jurisdiction.  
20 Every single piece of plaintiff's evidence is either immaterial  
21 as a matter of law, extremely weak, irrelevant or just don't  
22 make any sense.

23 Turning now to the jurisdiction under Rule 4(k)(2). So  
24 this is plaintiff's catch-all jurisdictional theory that is  
25 completely premised on the success of the other two theories.

1 Rule 4(k)(2) permits the assertion of the exercise of  
2 jurisdiction where the minimum contacts of the foreign  
3 defendant are sufficient with the United States as a whole even  
4 if not with respect to any particular forum. But, as we  
5 showed, plaintiff is unable to show minimum contacts under  
6 either stream of commerce theory or an agency theory in any  
7 forum anywhere in the U.S. and, therefore, it cannot be that  
8 there are minimum contacts with the U.S. as a whole.

9 And, finally, with respect to whether or not the exercise  
10 of jurisdiction is unreasonable or unfair, the Federal Circuit  
11 has said that showing that the exercise of jurisdiction is  
12 unreasonable or unfair only shifts to the defendant if the  
13 plaintiff shows first that there are minimum contacts by the  
14 foreign defendant in the forum. And here, because the  
15 plaintiff has never made the showing, the burden never shifts  
16 to the defendants. If the burden were to shift to defendants,  
17 certainly the exercise of jurisdiction would be unreasonable  
18 and unfair given that the foreign defendants are not operating  
19 in the U.S., operate thousands of miles away, and there is  
20 another entity, Lenovo U.S., which would be the correct  
21 defendant here.

22 And if the Lenovo defendants were dismissed and our motion  
23 were to be granted, it is very important to remember that the  
24 plaintiff would not be without a remedy. The plaintiff could  
25 still name Lenovo U.S. In many of the cases in which motions

1 to dismiss are granted, there are not even other entities for  
2 the plaintiff to name. The plaintiff is left with no one to  
3 sue, but here that's not true. The plaintiff has a remedy.

4 Your Honor, if there's any questions that you have that I  
5 can answer, I would be happy to answer them.

6 THE COURT: No. I think that was a very good  
7 presentation.

8 MS. YIP: Thank you, Your Honor.

9 THE COURT: Very good. Thank you, ma'am. And I'll give  
10 you a chance after plaintiff's counsel is done to come back up.

11 MS. YIP: Thank you.

12 MR. THOMPSON: Your Honor, may I approach with copies of  
13 my presentation?

14 THE COURT: Of course.

15 MR. THOMPSON: Again, Larry Thompson, Your Honor, for  
16 plaintiff.

17 THE COURT: Yes, sir.

18 MR. THOMPSON: There's one point that I want to address,  
19 you know, right off the bat before I get into our presentation.  
20 Lenovo's counsel made quite clear their opinion that Lenovo  
21 U.S. is the only proper party in this case, but Lenovo U.S.  
22 doesn't make the accused products. They don't ship the accused  
23 products to the United States. And Lenovo doesn't want to tell  
24 us or the Court who actually does that. And that's important  
25 here because what we do know and what's beyond reasonable

1 dispute here is that a foreign Lenovo company makes the accused  
2 products, distributes the accused products to the U.S., sells  
3 the accused products to Lenovo U.S., which [REDACTED]  
4 [REDACTED]  
5 [REDACTED], and then Lenovo U.S. then  
6 sells those accused products to retailers and customers  
7 nationwide, including in Texas.

8 THE COURT: Did you ask Mr. Cranor that question, [REDACTED]  
9 [REDACTED]?

10 MR. THOMPSON: Yes. He said [REDACTED]  
11 [REDACTED], but that was  
12 based solely off the investigation that Lenovo counsel  
13 performed and reported to him. And we were not able to  
14 actually even inquire to the details of that investigation  
15 based on objections of privilege at the deposition.

16 THE COURT: Okay. And is your position here today that  
17 you want to be able to take discovery to find that out?

18 MR. THOMPSON: Your Honor, I think we only need additional  
19 discovery if we are unable to convince the Court that we've  
20 carried our burden, and I think we have carried our burden on  
21 this record right now.

22 THE COURT: Okay.

23 MR. THOMPSON: But I think at the very minimum there are  
24 factual issues that certainly could be answered in discovery.  
25 Right? You know, the contract between Lenovo U.S. and the



1 person they buy the products from, the actual information on  
2 which Lenovo company makes the accused products. I mean, there  
3 are all sorts of things that could be answered very readily in  
4 discovery, but under the prima facie standard, we're entitled  
5 to get the benefit of all inferences from the current evidence.  
6 So even if it's not crystal clear or certain that the  
7 defendants are the people involved in this behavior, so long as  
8 the Court can infer from the evidence that they likely are,  
9 then that's enough for us to win right now.

10 THE COURT: Okay.

11 MR. THOMPSON: And so, again, going through what I was  
12 saying earlier, we know that a foreign Lenovo defendant is --  
13 I'm sorry -- a foreign Lenovo company is engaged in all the key  
14 activities overseas. All that we don't know, all that we're  
15 not 100 percent certain on is whether it's the defendants or  
16 some other foreign Lenovo company that Lenovo Group controls.

17 The best and most reasonable inference to take from the  
18 current record is that Lenovo Shanghai and Lenovo Group are the  
19 companies who make the accused products overseas, who  
20 distribute the products to the U.S., who sell the accused  
21 products to their [REDACTED] in the U.S. and who oversee  
22 and supervise the distribution of those products to retailers  
23 and customers.

24 THE COURT: I am curious why when Lenovo is telling you  
25 that you can sue another Lenovo entity, why you would be

1     uninterested in doing that.

2             MR. THOMPSON: Your Honor, we're not uninterested in suing  
3     Lenovo U.S., but we do have a case involving several other  
4     defendants on the same technology for you in this Court.

5             THE COURT: Right.

6             MR. THOMPSON: And Lenovo U.S. very likely will have a  
7     defense under the TC Heartland for improper venue, and, you  
8     know, Ms. Yip reserved that.

9             THE COURT: Right.

10            MR. THOMPSON: And so the question about going after  
11     Lenovo U.S. is that we would not potentially be able to do it  
12     in this Court.

13            THE COURT: I get that.

14            MR. THOMPSON: Which would, you know, worsen judicial  
15     economy, obviously be more expensive for us, and so -- and I  
16     think, more importantly, we learned from the Cranor deposition  
17     that [REDACTED]

18     [REDACTED]. I

19     mean, Mr. Cranor [REDACTED]

20     [REDACTED]

21     [REDACTED]. And so there's all sorts of  
22     information here that Lenovo Group, Lenovo Shanghai are in a  
23     much better position to provide than Lenovo U.S. is.

24            THE REPORTER: Counsel, I need you to slow down.

25            MR. THOMPSON: I'm sorry. Thank you.

1           So the facts that can be inferred from the current record  
2 are easily enough to support jurisdiction.

3           Now, if we were actually wrong about defendants and they  
4 didn't actually engage in the activity that we believe they do,  
5 I mean, it would have been the easiest thing in the world for  
6 them to come forward with actual evidence, with documents and  
7 from witnesses from their affiliates who actually do these  
8 activities. They have not done so and their failure to do so  
9 speaks volumes. And Your Honor's entitled to infer from that  
10 refusal that the evidence they're not providing would have been  
11 harmful and would have helped us carry our burden.

12           In addition, Lenovo hasn't directly controverted our  
13 allegations or evidence about foreign activities with any  
14 competent evidence. I mean, the only evidence they provided --  
15 well, actually with the original briefing and the original  
16 declarations, Mr. Cranor said nothing about what the defendants  
17 do overseas, which is, you know, obviously the key activity for  
18 the stream of commerce theory. Only in the deposition did he

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]. And we cited cases, Your Honor, to show  
24 that that cannot be used to refute our allegations or evidence  
25 in this proceeding.

1           So then beyond that, you know, Lenovo spends I think most  
2 of its argument trying to point out that the evidence we're  
3 relying on is circumstantial, but they don't make any argument  
4 or provide any proof as to why the inferences we're drawing are  
5 unreasonable. Right? I mean, they could do that. I mean,  
6 they could find some evidence that, you know, Lenovo Group has  
7 no manufacturing capabilities or that someone else actually  
8 does it, but they haven't done that. And in light of what we  
9 have, those inferences are perfectly reasonable and in fact are  
10 the most reasonable inferences.

11           So, you know, Lenovo's motion to dismiss should be denied  
12 on this record at this stage. Lenovo cannot win on the law,  
13 and they should not win as a matter of policy.

14           So I'd like to turn to Slide 2, Your Honor. And so,  
15 again, we have three theories of jurisdiction that we presented  
16 in the papers, direct contacts with the forum, stream of  
17 commerce contacts and agency based contacts. For the  
18 presentation I'll be focussing on direct and stream of commerce  
19 contacts for Lenovo Shanghai and stream of commerce and agency  
20 contacts for Lenovo Group.

21           So the next slides go into the burden and standard of  
22 proof. It appears that Lenovo has conceded that the prima  
23 facie standard is the appropriate one here so I'll skip over  
24 that for now.

25           So I think as a threshold issue, it's important to look at

1 4(k)(2) because 4(k)(2) is set up -- this is Slide 20, Your  
2 Honor. Rule 4(k)(2) is set up to make sure that foreign  
3 defendants are not able to escape jurisdiction in the U.S. in a  
4 U.S. federal court when they do have minimum contact with the  
5 U.S. And so here Lenovo has been served and Lenovo has refused  
6 to identify any other forum in the U.S. where they could be  
7 sued in this case. And that means that we now for this case  
8 can consider all contacts with the U.S. and not just contacts  
9 with Texas. I think that's very important to realize,  
10 especially when it comes to Lenovo Shanghai. And this is Slide  
11 22.

12 So Lenovo Shanghai obtained certifications that were  
13 necessary to sell the accused products in the U.S. They  
14 obtained the SEC certification and they obtained certifications  
15 from Underwriters Laboratories that are U.S. specific, and  
16 without these, the accused products could not be sold in this  
17 country.

18 Lenovo's only argument against that evidence is that it  
19 doesn't show a tie to Texas, but again, under 4(k)(2), it  
20 doesn't have to. All it has to do is show ties to the U.S. and  
21 certainly it's sufficient in context for the U.S. as a whole.

22 Now, looking at -- so that's a direct case for Lenovo  
23 Shanghai.

24 On Page 23 we talk about the stream of commerce test. And  
25 it's a very simple test. You asked if the defendants' products

1 are being sold to a nationwide distribution network and because  
2 of that are available in the forum. The second and third  
3 elements here are really, I think, beyond dispute. What's  
4 really going on here is Lenovo is saying that the accused  
5 products are not really their products. Right? And at a broad  
6 level this is Lenovo trying to have it both ways. I mean, when  
7 they talk to investors, they include the revenues and profits  
8 from these products in order to make their stock more valuable,  
9 but now that they're in court, they deny any role in these  
10 products in terms of making them, distributing them or  
11 designing them.

12 And going to some of the actual acts relevant to this  
13 theory, the evidence does show that the defendants make the  
14 accused products. So this is on Page 25. It kind of  
15 summarizes some of the major points. Lenovo's Group annual  
16 report states that Lenovo manufactures products. It has global  
17 manufacturing operations and actually owns manufacturing  
18 facilities.

19 And Page 26 has another piece of evidence on that ground.  
20 Lenovo manufactures one of the world's widest portfolio  
21 connected products. Now, Lenovo has said, well, statements  
22 like this are not, you know, narrow enough because that could  
23 be any Lenovo company. Well, if we turn to the next slide,  
24 Slide 27, this is the statement from the report that says,  
25 Lenovo has company owned manufacturing capabilities. And so

1 there's no doubt they define company in the report as Lenovo  
2 Group Limited. So Lenovo Group Limited, really is the only  
3 defendant in this case that actually has -- sorry -- the only  
4 foreign Lenovo company that's been identified in the record  
5 with any manufacturing capabilities.

6 Mr. Cranor on Slide 28 admitted that [REDACTED]

7 [REDACTED].

8 On Slide 29 he admitted that [REDACTED]

9 [REDACTED]

10 [REDACTED], which, again, I think counsel said that Mr. Cranor had  
11 unparalleled knowledge, but he's been at Lenovo 14 years and  
12 [REDACTED]. So I

13 don't think his knowledge is unparalleled.

14 But what's important here is that he did say that [REDACTED]

15 [REDACTED].

16 Well, the record shows that Lenovo Group is a Lenovo company in  
17 Hong Kong. That's in Slide 30. I'm sorry. Slide 31, Your  
18 Honor.

19 He also acknowledged based off the [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]. And what's part of the dispute here has been the  
23 records don't list model numbers. They list different types of  
24 computer products, you know, desktops, monitors. The dispute's  
25 over whether they say tablets or not, but we don't have that

1 evidence right now. I mean, Lenovo does, but we haven't had an  
2 opportunity to test that. But the inference certainly is, if  
3 Lenovo Shanghai is regularly shipping computer products to the  
4 U.S. and they're also certifying products for sale in the U.S.  
5 that the products they're shipping are likely the products  
6 they're certifying. And so I think that's additional evidence  
7 of Shanghai's role in shipping products to the U.S.

8 And even beyond the sort of tablet issue, which are the  
9 exemplary products in the complaint, the accused products here  
10 have not been duly defined. We haven't served our picks yet,  
11 and, in fact, one of the products that we've identified is an  
12 actual monitor/desktop. It's an all-in-one computer. This is  
13 on Slide 35. And there's no reason to think that this wouldn't  
14 be covered by one of the categories of imports on the Shanghai  
15 records.

16 So another part of the --

17 THE COURT: So with respect to the accused product you  
18 show on Slide 35, what is the evidence that this is  
19 manufactured or sold by one of the Lenovo defendants?

20 MR. THOMPSON: So, Your Honor, my argument is different  
21 here. My argument is that this is a product that has  
22 infringing capabilities.

23 THE COURT: Okay.

24 MR. THOMPSON: And that we know that Lenovo Shanghai has  
25 records where they're shipping in computer products, including



1 desktops and monitors like this, and it's fair to infer that  
2 the products being shipped in are -- the unknown or unspecified  
3 products being shipped by Lenovo Shanghai include products like  
4 this that also infringe. But, again, you know, we haven't had  
5 any chance for documentary discovery, and certainly there could  
6 be some additional information from Lenovo that might -- that  
7 might shed light on that, but, again, Lenovo has not provided  
8 anything itself to show that someone else is shipping this  
9 product.

10 So, again, going to the established distribution network,  
11 it's clear from the record that the Lenovo defendants are part  
12 of a distribution network that's designed to access a U.S.  
13 market. Again, Mr. Cranor admitted that [REDACTED]

14 [REDACTED]  
15 [REDACTED], and Slide 37 has two of the most  
16 useful excerpts on that point. For example, the question was:

17 [REDACTED]  
18 [REDACTED]?

19 The answer: [REDACTED]  
20 [REDACTED]  
21 [REDACTED].

22 And that is not only evidence of an established  
23 distribution network, but it's also, I think, you know,  
24 categorically what you would expect from an agency  
25 relationship. [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED].

So on Slide 38 we have some testimony that confirms also  
that [REDACTED]

[REDACTED].

And on Slide 39 we have testimony showing that the [REDACTED]

[REDACTED]

[REDACTED].

And then finally we have evidence on Slide 40 from the  
briefing of the accused products are available for sale  
nationwide and in Texas.

So, Your Honor, I think there is really no dispute that  
the stream of commerce theory supports either defendant.

Your Honor, do you have any questions on that theory so  
far?

THE COURT: I'm good.

MR. THOMPSON: Okay. So turning to the agency theory --

Well, there actually is one thing I wanted to discuss,  
Your Honor. I mentioned earlier how Lenovo's only evidence  
that controverts our allegations in evidence are the hearsay  
based statements of Mr. Cranor. And on Slide 46 we, you know,  
go through some of the cases that show that they're not able to  
use that sort of evidence, you know, to defeat our  
jurisdictional motion.

1           Now, one of the arguments that Lenovo made in its brief is  
2           that somehow Mr. Cranor is different because he was a 30(b)(6)  
3           witness, and they cite to a Fifth Circuit case in which the  
4           Circuit allowed testimony at trial from someone who was a  
5           30(b)(6) witness in areas outside of his personal knowledge  
6           because those are areas that he testified to in deposition.  
7           Well, that case was the case in which the plaintiff or the  
8           other party was attempting to cross-examine at trial the  
9           30(b)(6) witness. And so it was an adverse party that was  
10          using that testimony. The Circuit has made clear though that  
11          the -- you know, the party that's propounding the actual  
12          witness and who put the witness up for a deposition cannot use  
13          his testimony for their own purposes if it's based on hearsay.  
14          And that's what Mr. Cranor's testimony is based on, and there's  
15          no dispute about that.

16                So that was on Slide 52.

17                Now --

18                THE COURT: Well, let me parse that down a bit. Was the  
19          evidence that you're saying he relied on the information that  
20          he went out and had got from other Lenovo people to make sure  
21          the information was correct, or is this information that you  
22          say was provided to him by counsel and counsel said, we're not  
23          going to let you get into where the information came from?

24                MR. THOMPSON: So, Your Honor, the question at the  
25          deposition confirmed that Mr. Cranor [REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. So those are even  
potentially more flawed.

But again Lenovo has the ability to find someone who  
actually has personal knowledge of this stuff and to put them  
in or to have Mr. Cranor at least testify about a conversation  
he had with someone who had personal knowledge or a document  
that would show what they needed to, and they haven't done that  
here.

THE REPORTER: Counsel, you need to slow down.

MR. THOMPSON: Okay. Thank you. Sorry.

I think that's important here for -- and given the burden  
of proof of the prima facie case and how low that is. It's  
really -- a reason why the burden is so favorable is that it's  
meant to deal with situations in which they have the evidence  
and we don't. And that's true here. Even despite the single  
deposition that we've had, we have no access to their  
confidential internal documents, and we have to take their word  
for it, but we've still been able to, based off public  
discovery, find documents that make it reasonable to think that  
they're actually involved in the stream of commerce for the  
accused products.

1           So, Your Honor, turning to Page 53, we discuss the general  
2 tests for agency based jurisdiction, and this is appropriate  
3 whenever a corporate parent or affiliate directs or authorizes  
4 a subsidiary's jurisdiction conferring acts. Now, this is not  
5 an alter ego analysis, and it's not an exercise of jurisdiction  
6 based solely on the parent subsidiary relationship.

7           And at this point I want to talk about this Fellowship  
8 Filtering case that Lenovo cites. And it's clear from the  
9 language that the Court applied in that case that they're  
10 actually applying alter ego standards to this fact pattern, but  
11 maybe even more important for the current factors was that that  
12 decision was only made after an evidentiary hearing with live  
13 testimony. So the Court may have after, you know, hearing  
14 testimony come to different conclusions about what the evidence  
15 shows, but on this record, with the prima facie standard, those  
16 inferences cannot be drawn against us.

17           So on Page 54 we have a statement from the Supreme Court  
18 in Daimler where it talks about how a corporation can, you  
19 know, avail itself of a forum by directing its agents or  
20 distributors to take action there. And an example given is  
21 marketing a product through a distributor who has agreed to  
22 serve as a sales agent in the forum.

23           We also on Slide 55 have an excerpt from the British  
24 Telecomm case with Circuit Judge Bryson writing on this where  
25 he says: The agency theory differs in scope and application

1 from the alter ego theory. Under the agency theory, total  
2 domination or general alter ego criteria need not be proven.  
3 Rather, a parent corporation is held liable for the actions of  
4 a subsidiary if the parent directed or authorized those  
5 actions.

6 That's the test. It's not a pervasive theory. It's not a  
7 disregarding the corporate forum theory.

8 On Slide 56 and 57, Your Honor, we list several of the  
9 factors that we are applying to show agency, and we list the  
10 cases that support that. Without marching through each of  
11 these individually, I will comment that Lenovo's strategy  
12 largely is to sort of look at these factors individually, find  
13 the case in which that factor was not enough to put you over  
14 the line of agency and then say the factor is irrelevant here.  
15 And here the argument is that all these factors when combined  
16 show direction or control.

17 I'd like to turn to Slide 67, Your Honor, is where we talk  
18 about the headquarters in the United States of Lenovo, and, you  
19 know, one of the documents that we did cite for this  
20 headquarters point was a third party document, but it was based  
21 off interviewing Lenovo executives, but even beyond that, this  
22 Exhibit CC at the bottom here is from a Lenovo Group press  
23 release. So there's independent evidence of them announcing  
24 the headquarters status of Lenovo U.S.'s facilities, which,  
25 again, I think shows a very direct and very unusual connection

1 between the parent company and the subsidiary here.

2 So I'd like to also turn to Slide 70 now, Your Honor, and  
3 this is some testimony about the manner [REDACTED]  
4 [REDACTED], and this was some testimony that Lenovo's  
5 counsel mentioned earlier, but one part of this testimony that  
6 was not mentioned is here on Line 20 and 21 here.

7 The question was: [REDACTED]  
8 [REDACTED].

9 And the witness answered, [REDACTED].

10 So, again, the [REDACTED] is I think a very clear example of  
11 directing or authorizing that activity.

12 Slides 71 and 72 talk about the common branding causing  
13 consumer confusion, and this is actually a relevant factor that  
14 courts have recognized for agency and for stream of commerce  
15 for that manner, and I think the general idea is is that when  
16 you're dealing with the public in a way that deliberately  
17 prevents the public from knowing which of a corporate family  
18 they're actually acting with, then it's fair to say that  
19 everyone who potentially is in that relationship is purposely  
20 availing themselves of the forum because otherwise it gives the  
21 defendant a way to sort of take -- to have the benefit of, you  
22 know, doing business in the forum without having to be sued for  
23 the consequences of its business. Right? And we have examples  
24 here of Mr. Cranor being shown [REDACTED]  
25 [REDACTED]

1 [REDACTED].

2 THE COURT: Let me ask you this, and you don't have to  
3 tell me. I mean that because I don't mean to -- if it's  
4 something you don't want to tell me, I would understand why,  
5 but how is it that you all decided to sue the two Lenovo  
6 entities that you -- how did you select them? And if you don't  
7 want to tell me, you don't have to because it's --

8 MR. THOMPSON: At a high level, I think I can point out  
9 that Lenovo Group is clearly the entity in charge of the entire  
10 Lenovo organization, and Lenovo is an interesting company where  
11 probably more than almost anyone that I've dealt with, they  
12 have layers and layers of entities that are involved in ways  
13 that are completely opaque from the outside, but based off what  
14 we've seen, Lenovo Group is the one who controls everything.  
15 So that's why Lenovo Group is in the case.

16 And Lenovo Shanghai, you know, we found them on the  
17 certifications of the accused products that we have in the  
18 complaint. And so we felt that that clearly showed that they  
19 had a role in the case here.

20 THE COURT: Okay.

21 MR. THOMPSON: I would want to end with a discussion about  
22 the Court's options if the Court does not actually deny the  
23 motion today. I mean, there's discussions starting on Page 79  
24 where we talk about, you know, the general standard for  
25 jurisdictional discovery and their cases that have ordered more



1 jurisdictional discovery even when it's been had. It all  
2 depends on whether there's any reason to think that discovery  
3 will lead to more information relevant to a personal  
4 jurisdiction. I think here the record is abundant with  
5 situations in which discovery can answer questions that are  
6 important here.

7 And, finally, on Page -- yes. So on Page 83 and 84 we  
8 have discussion of the Court's ability to, you know, defer this  
9 issue until later in the case. It may well be that additional  
10 jurisdictional discovery could be taken with discovery on other  
11 issues in the case, and on Page 84 we've got some discussion of  
12 how the Court has the issue to defer this until trial, which  
13 may be helpful as well because there are a lot of issues on  
14 agency that are going to overlap with our underlying liability  
15 theories on infringement, you know, to which we have a right to  
16 trial by jury.

17 So unless Your Honor has any questions, I'll sit down.

18 THE COURT: I don't.

19 MR. THOMPSON: All right. Thank you.

20 THE COURT: Counsel, I'm sure you have a couple of things  
21 you're eager to respond to, and if you're like me, you want to  
22 get them all done before you forget what it was you were about  
23 to say, but I'm going to screw you up by asking you something I  
24 want to know, and then hopefully you'll be able to get there.  
25 I'm going to let you say whatever you want, but what counsel

1 for plaintiff just said actually was kind of what I was  
2 thinking might be the most appropriate thing here. A number of  
3 times he said that, you know, the problem he has, which on one  
4 level I'm sympathetic to, you know, in being able to get the  
5 appropriate information from the Lenovo entities to make sure  
6 they are suing the right people. They start off at some  
7 disadvantage in that regard. I get that. That's why I asked  
8 why they selected the ones they selected.

9 What would be wrong with allowing them, allowing the  
10 plaintiff to have some additional discovery that I would want  
11 you all to work out and get approved by me in terms of its  
12 scope to give the plaintiff an opportunity to get the  
13 information it needed to respond to this motion before I ruled?  
14 That is a -- that's probably where I'm leaning at the moment,  
15 and I'll let you address that.

16 MS. YIP: Sure.

17 THE COURT: By the way, your presentation was very good,  
18 and, you know, very persuasive, you know, but my goal is to  
19 make sure that while your offer to let them sue Lenovo U.S. is  
20 generous, I understand why they might not want to do that  
21 unless they have the wrong entities here, and so I'm tempted to  
22 allow them to do some discovery in that regard. So if you  
23 would address that, and then I'm happy to hear from you on  
24 anything else.

25 MS. YIP: Thank you very much, Your Honor, for the

1 opportunity to speak again and for your question.

2 I had anticipated that they would raise the jurisdiction  
3 issue, the additional jurisdictional discovery issue and so I  
4 prepared some additional demonstratives for your reference on  
5 this point if you would not mind me approaching and providing  
6 it.

7 THE COURT: Very impressive.

8 (Laughter.)

9 MS. YIP: So there's actually a standard for how we  
10 evaluate whether jurisdictional discovery is appropriate.  
11 Plaintiff's counsel made it seem like as if it's really a low  
12 bar to obtain additional jurisdictional discovery, but that is  
13 false.

14 In our earlier briefing we cited a case from the Western  
15 District of Texas that articulates what the standard is, and  
16 that's on Page 3 of the second slide presentation, and it says:  
17 As the party opposing dismissal and requesting discovery, the  
18 plaintiffs bear the burden of demonstrating the necessity of  
19 discovery. A plaintiff seeking jurisdictional discovery is  
20 expected to identify with particularity the discovery sought,  
21 explain what information it expects to obtain, and explain how  
22 that information would support the assertion of personal  
23 jurisdiction.

24 Another case on Page 4, the Firefighters case, is also  
25 instructive. We cited this in our briefing as well.

1 Jurisdictional discovery must be denied where plaintiffs have  
2 failed to identify what they believe discovery would reveal or  
3 how these newly discovered facts would establish personal  
4 jurisdiction over named defendant.

5 And I think that that's really key, that the  
6 jurisdiction -- the jurisdictional discovery is regarding the  
7 named defendant. The jurisdictional discovery that the  
8 plaintiff is seeking regarding who manufactures the products if  
9 it's not the foreign Lenovo defendants that are currently named  
10 is not jurisdictional discovery that allows us to ascertain  
11 jurisdiction over the currently named defendants. And if you  
12 look at the way that jurisdictional discovery is ordered in the  
13 cases, all the cases that I've seen order jurisdictional  
14 discovery about the named defendants. And there are cases out  
15 there that say that jurisdictional discovery should not be used  
16 as a means for a fishing expedition.

17 THE COURT: No. No. Let me assure you that's what I'm --  
18 I would be limiting the discovery to the named defendants. I  
19 get that. And also my general sense from having sat on the  
20 plaintiff's side occasionally is I don't think the plaintiffs  
21 have really any interest. It's kind of a pyrrhic victory for  
22 me to deny their -- the motion to dismiss here, go all the way  
23 through trial and have them find out that these two entities  
24 don't infringe or don't do what they say. So my sense is,  
25 while you've done a very good job in protecting Lenovo's

1 interest, and I understand why you would oppose wanting to  
2 allow this discovery to take place, I could even imagine the  
3 phone call with your client if you had to tell them I permitted  
4 this to go forward. I had some of those phone calls too, but  
5 it seems to me that the one area where your interest and the  
6 plaintiff's interest is aligned 100 percent here is in making  
7 sure that Lenovo Group and, I apologize, the other Lenovo  
8 entity are the appropriate entities. And I don't see the  
9 plaintiff's counsel wanting to spend any more money  
10 accomplishing that than the minimal that it would take. You  
11 all don't want to give them any more discovery than the minimal  
12 it would take, and what my hope would be is that you all could,  
13 on a fairly rapid basis, come to an agreement on what discovery  
14 the plaintiff feels it would need to take from the named  
15 defendants only, not a fishing expedition, but it seems to me  
16 the plaintiffs have a bigger interest really than you all do in  
17 making sure that these are the right entities and not just  
18 staying here.

19 And so I think what I'm going to do is I'm going to order  
20 that you all get together and have the -- let the plaintiffs  
21 tell you what discovery they think would be necessary that is  
22 limited to establishing that the two Lenovo entities that are  
23 in this lawsuit infringe, and what I mean -- not that they  
24 practice it, but I'm saying that they either make, sell or  
25 whatever, and if you all can't come up with -- if you all can't

1 come up with an agreement as to the scope of that discovery, we  
2 can get on a phone call. I'm relatively experienced at this  
3 kind of stuff, and I would be happy to get on the phone with  
4 you and have you all tell me -- have them tell me what they  
5 need that you don't want, and you would tell me why you don't  
6 want it and why they shouldn't get it. I think we would be  
7 able to resolve it, but I'd like to get that done pretty  
8 quickly, and it seems to me fair.

9 The plaintiffs really have two choices here. They can  
10 take your option of suing Lenovo U.S., which you've  
11 indicated -- I'm not saying they would wind up here, but they  
12 can do that, or they can invest in the discovery they need to  
13 establish a predicate for being here. And it seems to me you  
14 all should be able to work out the scope of that discovery, but  
15 if you can't -- you're protecting your client, they're  
16 protecting theirs -- I'll be happy to get involved in that  
17 scope. And all I care about is that you get that done pretty  
18 quickly.

19 And it seems to me that if the plaintiffs are unable to  
20 obtain discovery that would satisfy me, it won't satisfy them  
21 either that they want to maintain this suit against those two  
22 entities. They either have the right to two entities or they  
23 don't. So I'll limit it to that, but I assume -- if they were  
24 to take depositions, would those depositions be in Asia?

25 MS. YIP: So, Your Honor, first of all, thank you so much

1 for your comments. I appreciate them very much.

2 So actually when we were negotiating the timing of the  
3 deposition of the corporate representative that Your Honor had  
4 ordered, we had teed up the possibility of a witness located in  
5 China, and the plaintiff's counsel did not express any interest  
6 in that and repeated their desire to depose Mr. Cranor, and we  
7 did make Mr. Cranor available. So a witness in China is a  
8 possibility, although we haven't looked into that.

9 THE COURT: Or somewhere close to there since my  
10 recollection is China's not overly hospitable but Macau has  
11 some lovely hotels.

12 MS. YIP: It does. It absolutely does. Yes. Yes.

13 THE COURT: Hong Kong is nice this time of year.

14 MS. YIP: It's lovely. Yes.

15 THE COURT: So I've taken depositions in all those places  
16 and was grateful to get to go there.

17 Well, here's what I'm going to do: You all are  
18 exceptionally good lawyers. I think you all know the scope of  
19 discovery I intend for you all to be allowed to be taken. I  
20 understand it would have to be -- it's up to the plaintiffs. I  
21 will say probably on the record as it stands now, I would be  
22 predisposed towards not keeping this case here on the record  
23 that I have. I haven't made up my mind. I think your argument  
24 was pretty persuasive. That being said, I want to give the  
25 plaintiffs the decision -- they have a decision to make if they

1 want to take you up on what I would strongly suggest is an  
2 offer your client ought to make that someone will be made  
3 available on behalf of the two named defendants for them to  
4 take discovery of to establish that they are infringing.  
5 Again, I'm talking about only in terms of make, sell, use,  
6 whatever, not proof -- not discovery into proving infringement,  
7 but really I'll allow the plaintiff to have that opportunity to  
8 do that discovery if they want to, and I just would like for it  
9 to happen as quickly as possible.

10 MS. YIP: I understand, Your Honor. And, again, I  
11 appreciate your comments.

12 We certainly share the concern about being forced to  
13 litigate -- the Lenovo defendants being forced to litigate this  
14 case when in fact they do not have anything to do with the  
15 accused products in the United States, and that is certainly  
16 the subject of my colleague Martin Bader's motion to sever and  
17 stay, and --

18 THE COURT: I think if you're correct, the plaintiffs -- I  
19 know at least one of the plaintiff's counsel pretty well. I  
20 don't think they have any interest in going all the way through  
21 this process with your clients if they are able to determine  
22 early on that that's a fool's errand.

23 So I'm going to hold off on ruling on these motions until  
24 you all are able -- would you all -- do you think you all would  
25 be able to get this done within a month?



1 MS. YIP: I think that --

2 MR. BADER: I think so. However, the folks in China in  
3 setting up that deposition are notoriously kind of hard to --

4 THE COURT: Well, you might tell them that I might -- that  
5 I can keep them in here a lot longer and do this later if they  
6 think that would be preferable. And so I'm giving them a  
7 possible exit out early if it turns out one way. They're not  
8 getting out until we have this discovery taken. So it's  
9 really -- you can tell them they can -- it's not Chinese New  
10 Year. I've been through that too. So tell them they can be as  
11 cooperative as they want to be. Waco will be just a fine place  
12 for them to be down the road if they're uninterested in going  
13 this route.

14 MR. BADER: Understood. We'll do everything we can to get  
15 someone available.

16 THE COURT: And, seriously, here's the deal: I don't  
17 think we've set a Markman in this, have we? You know, y'all  
18 want -- I say this collectively -- want to get all this done  
19 before -- it's not going to be any additional effort on the  
20 plaintiffs to be preparing for the Markman. The sooner you all  
21 can get this done and we can get this resolved, the sooner I  
22 can either keep you in or let your folks out, and you get out  
23 of the wonders of drafting Markman briefs. So tell your  
24 clients it's really a business decision of theirs how involved  
25 they want to remain in this litigation.

1 MS. YIP: Your Honor, would it be okay with you if I take  
2 one last shot at trying to present some additional thoughts on  
3 this issue?

4 THE COURT: I'm pretty comfortable with where I'm at right  
5 now. You've done a fabulous job. Like I said, Paul Luckern  
6 always said that to me in the ITC, but he said it to everyone  
7 and usually it was right after he said something ugly and so  
8 I'm not sure that's always a compliment, but I sincerely mean  
9 you did a terrific job. Very persuasive. I think the  
10 plaintiffs have legitimately raised an issue of they only have  
11 so much transparency into what your two clients actually do  
12 that might be jurisdictional for a claim of patent  
13 infringement, and I want to give them an opportunity -- if --  
14 they're not going to spend the money to do it, I wouldn't  
15 think, unless they believe in good faith it's worth doing it.  
16 I'm actually doing, in my opinion, your client a favor. They  
17 may not feel that way. They probably won't tell you that they  
18 think it was, but it seems to me there's no better evidence of  
19 good faith on the part of the plaintiffs that they believe  
20 these two entities belong in the lawsuit than if they are  
21 willing to go to China and get the evidence that they believe  
22 exists. I think that's a pretty fair resolution of dealing  
23 with this.

24 And I'll say this: I'm not telling the plaintiffs they  
25 have to do this. If the plaintiffs decide not to do this,

1 we'll stand on the record. I'll rule on these motions. If  
2 they tell me they do want to do it, then just -- I would try  
3 and get it done within a month. And if you have any issues  
4 about the scope, I really don't -- the thing I hated the most  
5 was, you know, oh, you can only have three hours, you can have  
6 eight. You know, y'all spend eight hours fighting over the  
7 number of hours. You know, if there are issues like that, just  
8 call me. I'll listen to why they want four days in Macau and  
9 you only want an hour and I will come up with something I think  
10 is a reasonable resolution of that as well. I don't want y'all  
11 spending a lot of time fighting over stuff like that, which I  
12 know occasionally patent lawyers can do.

13       You know, I've been through all this, and I didn't mind  
14 any of it other than the fighting over what was going to  
15 happen. I never enjoyed that very much or thought it was very  
16 productive. So if you all can't agree to anything, call, and  
17 with a song in my heart and great joy, I'll be happy to take  
18 the phone call and resolve it for you. Although, I'll say, as  
19 always, which I say to my two teenage sons, you are always  
20 better off resolving it yourselves in terms of getting what you  
21 want. I can be relatively arbitrary in my decision and it  
22 doesn't affect me as much.

23       Thank you all for being here. Everyone did a great job.  
24 This is the greatest job in the world because we've got great  
25 lawyers.

1           What do I need to do?

2           (Brief off-the-record discussion.)

3           THE COURT: The motion to sever? I'm going to hold off on  
4 the motion to sever until we get this done, if that wasn't  
5 clear. And so we'll take up the other motion -- I thank you  
6 for reminding me, but I want to get this done and that may  
7 obviate the need to take up any of the other motions. I think  
8 it would.

9           MS. YIP: Thank you so much for your time, Your Honor.

10          THE COURT: Thank you for being here.

11          (Hearing adjourned at 11:54 a.m.)

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1 UNITED STATES DISTRICT COURT )

2 WESTERN DISTRICT OF TEXAS )

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4 I, Kristie M. Davis, Official Court Reporter for the  
5 United States District Court, Western District of Texas, do  
6 certify that the foregoing is a correct transcript from the  
7 record of proceedings in the above-entitled matter.

8 I certify that the transcript fees and format comply with  
9 those prescribed by the Court and Judicial Conference of the  
10 United States.

11 Certified to by me this 4th day of June 2019.

12  
13 /s/ Kristie M. Davis  
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